

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 19**

ROSEBURG FOREST PRODUCTS,

**Case No. 19-CA-213306**

Respondent,

and

**RESPONDENT'S POSTHEARING  
BRIEF**

CARPENTERS INDUSTRIAL COUNCIL  
(CIC), LOCAL UNION NO. 2949,

Charging Party.

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Respondent Roseburg Forest Products hereby files this post-hearing brief. Based upon the substantial weight of the evidence, the complaint should be dismissed.

## **I. INTRODUCTION**

This case was tried in Roseburg, Oregon on August 29, 2018, before the Honorable Eleanor Laws, Administrative Law Judge.

Roseburg Forest Products (“RFP”) hired Nick Miller in November 2003 and he worked as a Detail Saw Operator, assigned to the Finish End Crew at RFP’s mill in Riddle, Oregon. Tr. 49:22, 50:21. Miller learned the job quickly and he was recognized as a skilled employee; however, beginning in 2016, there was a marked decline in Miller’s attitude and ability to work on a team. Emp. Ex. 13. This decline was at the same time as the then-Plant Manager, Tony Ramm, began to increase the professionalism at the mill, and elevated the standard of acceptable conduct. It was not acceptable to call another “idiot,” “stupid,” or “dumb.”

The first sign of Miller’s decline was an incident that occurred in May 2016. Miller failed to properly monitor a less experienced co-worker, and received discipline. Miller was warned that his attitude and job performance must improve immediately, or he would be terminated. Unfortunately, Miller’s attitude and performance did not improve. Miller lost his certified buddy status, which no other employee had lost at the mill before. Tr. 149:10-12. Miller’s attitude and performance continued to decline in 2017. In the spring, his conduct during a crew meeting resulted in a one-on-one meeting Ramm, in which Miller was warned, again, that his attitude needed to change. Over this period, Miller’s performance evaluations also show the downward spiral of his attitude and engagement. Emp. Exs. 12, 13, 14, 15. It was clear, that Miller was not getting on board with improving the culture and increasing the level professionalism by Ramm.

In late August and early September 2017, there were several forest fires in areas near Riddle, Oregon, and there was a significant amount of smoke in the mill. On September 5, 2017, Safety Manager Deneen Dahl met with a number of employees, including Miller and the Finish End Crew. They discussed RFP's response to the smoke. During the meeting, Miller and Dahl agreed RFP's response was not ideal, but neither had any better suggestions or ideas on how to address the smoke. Miller agreed to come to Dahl if he had any suggestions on the situation. On the same day, Miller posted on Facebook his view on the situation with the smoke in the plant. Miller posted the act of closing the doors to keep out the smoke was "the level of stupidity that our management team has elevated to."

On September 6, 2017, Dahl was informed of the post by a bargaining unit employee. Dahl thought the post was inconsistent with her conversation with Miller and the Finish End Crew the day prior. Dahl wanted to meet with Miller to discuss any continued concerns about smoke and to hear any suggestions he may have on how to improve RFP's response. Dahl was not concerned about the post itself. There were a number of employees who posted about RFP, and none of these employees were terminated or disciplined for their posts. There is a clear group of similarly situated employees.

Dahl convened a meeting to talk with Miller on September 6, 2017. The meeting was attended by several individuals, including Miller and Ed Weakley. Weakley is a 50-year employee, assigned to the Finish End Crew, and a union shop steward. In spite of the questioning by Counsel for the General Counsel, this was not an investigatory meeting. None of the employees who testified at the hearing referred to this meeting as an "investigator meeting." In fact, Weakley,

stated the September 6 meeting was not referred to as a “investigatory meeting,” and he described how this meeting was different from an actual investigatory meeting. Tr. 35:24-36:12.

The September 6 meeting reportedly lasted for about 30-45 minutes, but only the beginning covered the topic of smoke in the mill and RFP’s response. Miller transitioned the meeting to his personal complaints, and Miller “ranted” about his personal gripes. In airing his personal gripes, Miller claimed he would be better off without RFP, he would make more money, and he called all managers at RFP idiots, dumb, and stupid. Miller became increasingly excited and agitated, and Miller raised his voice. Tr. 144:9-12. At different times during the meeting, both Dahl and then-HR Director Tris Thayer<sup>1</sup> asked Miller to calm down, but he failed to do so. Miller’s tone continued to escalate and Miller repeatedly said “you are all stupid and dumb,” referring to the managers in the room, including his uncle Ken Miller. Tr. 196:14-25. Finally, when there was no chance Miller was to going to stop airing his personal gripes, Thayer ended the meeting. Thayer, Dahl, and the other managers present, recognized Miller was too emotional to safely return to work. Accordingly, Thayer suspended Miller pending investigation. Tr. 196:12.

Ramm was vested with authority over personnel decisions, but he was out of the area on September 6, 2017. When Ramm returned to the mill, he was briefed about the situation with Miller. Ramm deliberated over the appropriate response from RFP. Ramm reviewed Miller’s history of poor behavior, his failure to improve his attitude despite prior warnings, Miller’s continued unprofessional outbursts, and Miller’s personnel file. Importantly, Ramm did not know Miller had posted anything on Facebook. After deliberation, Ramm decided to terminate Miller’s employment. Tr. 230:19-24.

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<sup>1</sup> Thayer left RFP in December 2017 and began working for Swanson Group in Glendale, Oregon. Tr. 185:16-17.

Counsel for General Counsel argued in opening statement it would prove Miller was suspended and terminated in response to his Facebook post. Tr. 8:19-21. However, Counsel for the General Counsel failed to present evidence sufficient to meet its burden because the post was not a motivating factor in the suspension or termination decision. The evidence shows Ramm did not even know Miller had posted on Facebook at the time of the termination decision. Plus, there are several similarly-situated employees who posted about RFP on Facebook, and these other employees were not asked by RFP to remove their posts, these other employees did not remove their posts, and these other employees were not terminated. Finally, Miller admitted he has no evidence his termination was related to the post when he stated, he “assumed it [his termination] was over the Facebook post.”

As for the September 6 meeting, Miller took the meeting in a different direction when he ranted about his personal gripes for 20 to 35 minutes. During this rant, Miller raised personal issues and repeatedly attacked RFP supervisors in the room – calling them dumb, stupid, and idiots. If there was any protected activity it occurred during the first 10 minutes of the September 6 meeting, and Miller continued on his rant well after it ended. Miller’s conduct was not protected by the Act.

Alternatively, Miller’s personal attacks on RFP supervisors were well beyond the level of acceptable behavior at RFP. It is undisputed that Ramm raised the bar of acceptable behavior, and calling another employee “stupid,” “dumb” or “an idiot” was an egregious deviation from the level of acceptable conduct at RFP Riddle Plywood mill in 2017. Accordingly, under the Board’s totality of the circumstances standard, Miller’s conduct lost any protection under the Act<sup>2</sup>.

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<sup>2</sup> *Pier Sixty*, 362 NLRB No. 59 (2014).

RFP terminated Miller based on his downward spiral of a series of unprofessional incidents, and his attitude had evolved to the point where there was no likelihood of improvement or recovery. RFP's termination of Miller was based on legitimate non-discriminatory reasons, and Miller's conduct during the September 6 meeting was not protected by the Act.

For the reasons outlined below, the complaint against RFP should be dismissed.

## **II. JURISDICTION**

RFP is a privately owned wood-products company founded in 1937. RFP admits that it is an employer engaged in commerce within the meaning of Section 2 of the NLRA.

## **III. FACTS**

### **A. RFP Operations**

RFP is a forest products company based in Springfield, Oregon. For over 75 years, it has been a closely held manufacturer and marketer of wood products. RFP's products include engineered wood products, lumber, softwood plywood, composite, hardwood and thermally fused laminate panels, wood-fuel pellets, and other value-added products. RFP has property and facilities in the Northwest and Southeast United States and markets its products to customers throughout North America. RFP's mill in Riddle, Oregon manufactures softwood plywood. Riddle, Oregon is a small community and due to the large size of RFP's operations there, it is not uncommon to see family members working together at RFP. The mill employs over 400 production, maintenance, and transportation employees who are represented by the Carpenters Industrial Council, Local Union No. 2949. Tr. 52:23-25. RFP and the Union have a history of a good bargaining relationship and the current working agreement between RFP and the Union covers the period of June 1, 2016 to May 31, 2020. G.C. Ex. 2.



**B. Ramm's Culture Change at Riddle and the Level of Tolerated Conduct**

When Ramm started as the Plant Manager, he had a plan to change the workplace culture. Tr. 226:1-5. The change started with the leadership/management staff, and Ramm worked hard to build a management team that role modeled the values of how to treat employees. Tr. 226:13-17. The culture became one of respect, and foul language and derogatory comments were not tolerated. Tr. 227-19-23. It was undisputed that Ramm did not allow language at the mill that would damage an employee's self-esteem, and calling another employee an "idiot," "stupid," or "dumb," was beyond the bounds of acceptable conduct. Tr. 228:2-14.

Weakley's testimony confirmed the change in culture. Tr. 32:16-22. Weakley stated that within the past two to three years (2015-2016) he has not been called an idiot, dumb, or stupid. Tr. 33:10-16. Weakley acknowledged "as far as company-wise" it is not acceptable to call people idiots, stupid or dumb. Tr. 33:23-34:1.

Ramm enforced these high standards. Ramm explained he had disciplined a 20-year employee, Nick Parker, for his inappropriate comment to an employee. An employee on Parker's crew raised a safety concern with Parker that he was hitting his head on a bolt that was hanging from up above on a beltway, and in response, Parker merely responded "well, duck next time." Tr. 226:24-227:3. Ramm explained that this was the type of disrespectful conduct that was not tolerated and Parker received a two-week suspension. Tr. 227:5-8.

**C. Miller's Decreasing Performance and Decline of Attitude**

Miller was hired at RFP in November 2003 and was recognized for years as a skilled Detail Saw Operator. Tr. 49:22, 50:21. Miller's 2014 performance review showed only two areas that needed improvement and his supervisors wrote that Miller was reliable, a team player, and ready

to step in and help out. Emp. Ex. 12. However, beginning in 2016, Miller's performance started to change. RFP noticed a decline in Miller's engagement, attitude, and ability to work on a team. Compared to 2014, Miller's 2016 performance reviews showed several more areas that needed improvement. Emp. Ex. 13. *Id.* Miller was also less interested in learning new positions at the mill. *Id.*

1. Miller's May 2016 Written Warning

On May 13, 2016, Miller's supervisor sent him home early due to performance and behavioral issues. Emp. Ex. 11. His supervisors, Forrest Bray and Dan Cornell, and Thayer met with Miller and Weakley. *Id.* At the meeting, RFP issued Miller a Corrective Action Discussion, which explains that Miller was not on his saw working when he should have been there helping a newer employee. *Id.* As part of the Corrective Action Discussion, RFP provided Miller with a book that teaches people how to communicate well and appropriately with others in order to be productive. *Id.*; Tr. 187:18-188:2. During the meeting, Miller called Bray, who was sitting right there in the room, "lazy" and said that "he's a terrible supervisor, he's worthless." Tr. 148:16-17. Miller refused to sign the Corrective Action Discussion form, but he was explicitly warned that his "attitude [and] future job performance, both must improve immediately for you to continue to work here." Emp. Ex. 11.

2. No Other Employee at the Mill Has Ever Lost Certified Buddy Status

As part of the same May 13, 2016 issue, Dahl was called into the Corrective Action Discussion meeting with Miller to discuss a serious safety issue that had come to RFP's attention. Tr. 147:13-148:18. Previously, Miller had "certified buddy status," which meant that he would take on the role of a supervisor in making sure an employee locks out correctly. *Id.* In order to

have certified buddy status, employees must undergo training and be trusted to safely ensure the work is done. Tr. 147:19-22. Certified buddies are required to sign off that the procedure is properly performed. Tr. 147:23. However, on the same shift where his supervisor had found him in the shipping department rather than on the detail saw, Miller had signed off as a certified buddy for the newer employee even though the lockout tagout had not been done properly. Tr. 148:4-13. When Dahl asked Miller what had happened, Miller said that it was not his fault because he “was really frustrated and angry” with his supervisor who had a performance conversation with Miller that day. *Id.* Miller also said that he could not be responsible for the new employee’s safety and that she should have known better because he was frustrated. *Id.* RFP decided that Miller could not keep his certified buddy status since he had explicitly stated that he failed to recognize the seriousness of the safety violation and Miller had even stated that he could not be responsible for another employee’s safety. *Id.* No other employee has ever lost certified buddy status.

### 3. Miller’s Poor December 2016 Performance Review

In December 2016, Miller received another performance review, this one showing only a few areas that met expectations, and all others needing improvement. Emp. Ex. 15. The review showed that Miller needed to improve in working effectively with other employees and dealing with conflict in a constructive manner. *Id.* The performance review specifically noted on the review that he “would like Nick to get better overall on teamwork.” *Id.*

### 4. Plant Manager’s Conversation with Miller About Inappropriate Conduct

In 2017, Plant Manager Ramm terminated supervisor Mike Miller, who is Nick Miller’s father. At a crew meeting with employees in mid-2017, Nick Miller asked Ramm why he fired some supervisors and kept others that Nick Miller felt were bad, Nick Miller was insisting on

discussing his father's termination in the large group setting<sup>3</sup>. Tr. 243:5-11. Ramm explained that it was inappropriate for him to discuss individual employees' performance issues in such a group setting and that they should have a more private conversation. Tr. 234:8-21. During the meeting, Nick Miller and Ramm discussed both Mike Miller's termination and Nick Miller's issues with his supervisor Bray. Tr. 242:19-21. Ramm assured Nick Miller that while he could not discuss specifics with him, both supervisors had been investigated according to company policy. Ramm felt that the conversation with Nick Miller ended on good terms. Tr. 242:23-24.

**D. Smoke From Forest Fires, RFP Response, and Discussions with Employees**

On August 27, 2017, a forest fire started in the vicinity of the Riddle mill. As Labor Day weekend approached, Roseburg made plans to keep employees safe during smoky conditions inside the mill, including handing out dust masks and opening the doors to the mill at night when the smoke dissipated. Tr. 104:23-24. However, because the mill is not a sealed facility, it was impossible to keep the smoke out entirely. Tr. 104:14-16. RFP shut down the mill a few times and supervisors were instructed to allow individual employees to go home if they believed that the smoke was endangering their health. Tr. 105:1-12.

1. Dahl's September 5 Meeting with the Finish End Crew

On September 5, Dahl and Chad Lynch, the Panel Superintendent, went to the Finish End lunchroom to talk with the crew because she had heard from Ken Miller, Supervisor at RFP, there were employee concerns about the smoke. Tr. 107:8-16. Weakley was also at the September 5 meeting. Dahl asked Miller if he wanted to talk about his concerns for how the smoke in the mill

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<sup>3</sup> Miller, for the first time during rebuttal, testified he was asking questions on behalf of the group; however, there is no evidence from other witness, and, ask explained below, Miller lacks credibility.

was being handled. Tr. 108:5-9. Miller explained that he did not think that closing the doors and windows was going to keep smoke from coming in and he felt that was pretty silly. Tr. 108:9-12. Dahl agreed that it was not the best plan and asked if he had any other suggestions because she could use all the help she could get and was all ears for any ideas from Miller. Tr. 108:17-24. Miller did not offer any suggestions, but he did say “it’s just stupid to think you are going to be able to keep the smoke out of the mill.” Tr. 109:1-3. Dahl felt the meeting ended with the understanding that everyone was doing the best they could, and Miller would bring any concerns and ideas to her. Tr. 109:9-13.

## **2. Nick Miller’s Facebook Post**

On September 6, 2017, Safety Trainer Linda Wright, who is a bargaining unit member, showed her a post that Nick Miller wrote on the Union’s Facebook page. Miller posted:

Apparently closing all of the doors and windows will help keep the smoke out of the plant. Even though the plant isn’t sealed and there isn’t a filtration system. This is the level of stupidity that our management team has elevated to.

Emp. Ex. 4. Dahl thought the post was inconsistent with the conversation that she had with Miller just the day before, Dahl wanted to talk with Miller to see if he had any additional concerns.

## **E. Miller’s Personal Gripes, Egregious Conduct During the September 6 Meeting**

On September 6, 2017, there was a meeting that lasted between 30 to 45 minutes. Tr. 75:9-10; 25:24-25. Miller “launched into something totally separate” after 10 minutes. Tr. 142:2-3; 143:14-22. For 20 to 35 minutes, Miller went on a rant about his personal gripes, and Miller worked himself up into such an agitated state he was unsafe to return to work.

The September 6 meeting was called because RFP wanted to talk with Miller about the smoke. This was not an investigatory meeting. None of the employees who testified at the hearing

referred to this meeting as an “investigatory meeting.” Weakley stated the September 6, 2017 meeting was not referred to as a “investigatory meeting.” Weakley described how this meeting was different from an actual investigatory meeting, as he has attended investigatory meetings in the past. Tr. 35:24-36:12. First, Weakley explained in an “investigatory meeting” he would be informed what the meeting was going to be about before the meeting was convened, but that did not happen on September 6, 2017. *Id* Weakley also testified the number of people who attended the September 6 meeting distinguished it from an investigatory interview. Tr. 36:13-17. The phrase “investigatory interview” was injected by Counsel for the General Counsel, and was not established by any witness.

The September 6 meeting took place in the HR office; however, Dahl stated the group would have met in the Safety Manager’s office, but there is no table to sit around, so they used the table and chairs in the HR office. Tr. 139:6-7. Individuals who attended the meeting included Thayer, Dahl, Safety Technician Dathen Walker (“Walker”), Plant Superintendent Tate Muir, Lynch, Ken Miller, Nick Miller and Weakley. Tr. 139:20-23. The meeting lasted about 30 to 45 minutes. 75:9-10; 25:24-25.

Dahl started the meeting by explaining to Miller that she had met with him yesterday, went through their conversation, and explained everything RFP was doing to try to address the smoke. Tr. 140:13-16. Thayer explained that the meeting was not at all disciplinary, rather the company wanted to understand Miller’s frustration evident in the post and see if they could work towards a resolution. Because the meeting was not for the purpose of discipline, no one at RFP took any notes.

At the beginning of the meeting, Dahl expressed her confusion about Miller's post because she thought the two had ended the conversation on a positive note the day before in the lunchroom. Tr. 140:16-20. Weakley also confirmed that he remembered the same conversation from September 5. Tr. 140:22. Miller responded that he did not think Dahl or Lynch were stupid, but he felt that the "rest of the management team is a bunch of idiots." Tr. 141:11-14. After this comment, Dahl asked if he had any additional concerns about the smoke since that was the purpose of the meeting and Miller said none that they had not already discussed. Tr. 141:21. Walker showed Miller the photos that he had been taking to monitor the smoke levels and Dahl encouraged Miller yet again to bring any suggestions he had forward. Tr. 142:1-3. Importantly, RFP management did not criticize Miller for the post or ask Miller to remove the post during the meeting.

Only 10 minutes into the 30 to 45-minute meeting on September 6, Miller "launched into something totally separate." Tr. 142:2-3. At this point, Dahl left the meeting and went to her office across the hall. Miller became defensive and agitated, saying to Thayer that "Roseburg never listens to any of my ideas. I've had a lot of ideas and they're not implemented. Roseburg would make way more money if they would do what I suggested. I could make more money." Tr. 142:7-11. Miller continued to raise his voice, becoming increasingly agitated and loud stating "managers are stupid, no one listens to me. I've had all these ideas" and that he had "never even gotten a thank you." Tr. 143:7-11. Dahl, Thayer, Muir, and Lynch repeatedly asked Miller to calm down and to keep it professional, but he would not stop his rant. Tr. 144:9-12, 196:14-20. Miller was just repeating "you guys are all dumb and stupid and idiots." Tr. 197:1.

Eventually, Thayer asked Miller and Weakley to step out of the room. When Dahl saw them leave from across the hall, Miller was still agitated, his face was red, and his body language

showed his frustration. Tr. 145:12-17. After they left the room, Thayer asked Dahl to join him, Lynch, and Ken Miller in order to discuss Nick Miller's conduct at the meeting. Dahl felt that they had not been able to get the meeting back to a professional place with Miller and worried what would happen if Miller's pattern of behavior continued to escalate. Tr. 150:13-16. According to Dahl, it is very common when someone is frustrated, as Miller was on September 6, to send the person home on suspension. Tr. 146:3-6. Dahl explained it is a safety issue and when employees are not in an emotional state to safely return to work, they are sent home. *Id.* The group discussed that Miller's emotional state was agitated, his face was red, and he was visibly upset. The group decided Miller was not in a state where he could safely perform his duties. Accordingly, Miller was suspended, pending an investigation into his behavior. This would ensure he did not create an unsafe work environment by going back to work in such an agitated state. Tr. 146:1-3.

#### **F. Termination of Miller**

Ramm was not in Riddle for the September 5 or 6 meetings, but returned to the mill on September 8. Tr. 199:17-18. When he returned, Ramm was informed of what had happened at the meeting on September 6. Tr. 199:22-24; 231:5. As part of Ramm's investigation into Miller's conduct, he talked with Thayer, Dahl, Muir, Lynch, and Ken Miller about what had happened. Tr. 231:8-13. Ramm also reviewed Miller's employment history, including Miller's performance reviews and prior discipline. Tr. 234:8-11. Notably, Miller's Facebook post played no role in Ramm's decision to terminate Miller's employment because Ramm did not even know of the Facebook post until questioned during this hearing. Tr. 246:16-24. Ramm decided there was a clear escalating pattern of behavior that Miller had difficulty following instructions and he treated people disrespectfully. Ramm concluded Miller was "unwilling to be a good team member." Tr.



235:1-4. Miller's conduct simply did not line up with the principles and values that Ramm was working hard to establish at the mill. Tr. 235:20-22. Ramm explained he terminated Miller's employment because even though Miller "was a great operator" and "super intelligent, . . . he was damaging the rest of the team." Tr. 235:17-20.

#### IV. ANALYSIS

Counsel for the General Counsel argued RFP "suspended and terminated [Miller] *in response* to his post on the local union's private Facebook page." The complaint alleges Miller "engaged in union activities . . . by posting comments about working conditions at the facility on the Union's Facebook page," and on September 6, 2017, "Miller asserted his rights to engage in . . . concerted activity." GC Ex. 1(e).

As explained in detail below, even if the Facebook post was protected concerted activity, under *NLRB v. Wright Line, Inc.*, Counsel for the General Counsel failed to establish the post was a motivating factor in RFP's decision to suspend and Ramm's decision to terminate Miller. 251 NLRB 1083, 1089 (1980), *enfd* 662 F.2d 899 (1st Cir. 1981).

Also, even if Miller engaged in concerted activity on September 6, it was limited to the first 10 minutes of a 30 to 45-minute meeting. After the first 10 minutes, Miller's "rant" took the meeting in a different direction where he aired his personal gripes for 20 to 35 minutes. These gripes included verbally attacking RFP supervisors in the room by calling them dumb, stupid, and idiots – repeatedly. Based on the separation between any alleged concerted activity and the rant of personal gripes, Miller's conduct was not protected by the Act. Counsel for General Counsel failed to establish the first 10 minutes of the September 6 meeting was a motivating factor in RFP's decision to suspend and Ramm's decision to terminate Miller.

In the alternative, even if Miller's conduct during the entire 30 to 45 minute-meeting could be found as concerted activity, under the totality of the circumstances standard (applied by the Board in *Pier Sixty*, 362 NLRB No. 59 (2014)), Miller's conduct at the September 6 meeting must be considered in light of the very high standards of acceptable conduct at the Riddle Plywood plant in 2017. Accordingly, Miller's conduct was such an egregious deviation from the level of acceptable conduct that the conduct lost the protection of the Act under *Atlantic Steel*. In *Pier Sixty*, the Board applied *Atlantic Steel* on a sliding scale based on the record showing the nasty language accepted in that workplace. If the *Atlantic Steel* standard slides, it must slide in both directions. In this case, Miller's conduct during the September 6 meeting was such an egregious deviation from the level of acceptable behavior at RFP's Riddle Plywood mill that it lost the protection of the Act.

Based on these arguments explained in detail below, the complaint should be dismissed.

**A. As a Preliminary Matter, Nick Miller's Testimony Should Be Rejected as It Lacks Credibility**

The testimony of Nick Miller is not credible and should be rejected. In determining the credibility of witnesses, the Board has applied the following factors: any conflicting testimony; established or admitted facts; inherent probabilities; reasonable inferences drawn from the record; and interest in the outcome of the proceeding. *Northridge Knitting Mills, Inc.*, 223 NLRB 230, 235 (1976); *F. W. Woolworth*, 204 NLRB 396, 401 (1973). The Board also considers the context of the witness testimony, the witness's demeanor, and the weight of the respective evidence. *Double D Construction Grp.*, 339 NLRB 303, 305 (2003).

**1. In Determining Credibility, the Board Considers Any Conflicting Testimony**

Miller's testimony is not credible because his testimony was vague, internally inconsistent, and conflicts with other witnesses' testimony. ALJs have found a witness's testimony "unworthy

of belief” where the witness’s testimony was discredited by conflicting testimony of other witnesses who appeared credible and where the witness’s testimony itself was the clearest indication of his unreliability as a witness. *R.K. Baking Corp.*, 120 NLRB 772, 775 (1958). In assessing conflicting testimony, an ALJ should also credit a witness’s certain and detailed account of meetings or conversations over the accounts of witnesses whose testimony is equivocal or vague. *Sysco Columbia, LLC*, 2018 NLRB Lexis 335, \*6 (2018).

First, Miller had little to no recollection of the September 5, 2017 meeting in the lunchroom, saying that he “wasn’t paying attention” because he was eating his lunch. Tr. 85:20-24. However, Dahl’s testimony directly contradicts Miller’s version of the meeting that day. Dahl explained with much more detail, that she remembers approaching Miller and Weakley during that meeting in the finish end lunchroom because she had learned that Miller was concerned about the smoke. Tr. 107:20, 108:5-9. Dahl specifically testified: “Nick turned around and engaged with me. And he did tell me he didn’t think that closing the doors and windows was going to keep the smoke from coming in. He felt that was pretty silly.” Tr. 108:9-12. Dahl even agreed with Nick that it was not the best plan and explicitly asked if Miller had any other suggestions because, she said: “I’m all ears, I could use all the help I could get.” Tr. 108:23-24. Miller’s response to Dahl was that he did not have any other suggestions but that RFP’s current plan was “stupid.” Tr. 108:24-109:3. Dahl’s testimony shows that Miller was in fact paying attention and clearly had an entire conversation with Dahl about the measures RFP had undertaken to try to lessen the smoke in the mill.

Second, Miller’s testimony regarding the September 6 meeting is contradicted by several other witnesses. Miller’s testimony was also vague, equivocal, and not supported by Weakley’s

testimony. Considering the meeting was the last time Miller was at RFP before his termination and considering it had been less than a year since the meeting at the time he testified, Miller should be able to recall more specifics about the meeting. For example, he said: “I remember somebody else being there, but I don’t remember who it was.” Tr. 82:19-20. He also could not recall whether that person was male or female, could not recall whether the person was sitting or standing, and could not recall whether Weakley took notes during the meeting. Tr. 82:21-83:7. Weakley also could not clearly articulate who was present at the September 6 meeting and therefore does not corroborate Miller’s testimony. First, Weakley testified that Alice Briggs attended the September 6 meeting and that she was taking notes. Tr. 26:4. He also “believed” the intern “Nathan” was present and that “the other two could have been Kevin and Craig and—oh, Chad Lynch.” Tr. 26:5-8. The nature of this testimony shows that Weakley was not confident in his response, using phrases like “I believe,” “could have been,” and “oh.”

On the other hand, Dahl and Thayer affirmatively testified to who all was in attendance at the meeting. Tr. 139:4-23, 194:22-195:3. Both Dahl and Thayer testified with absolute certainty that Briggs was not at the September 6 meeting as she was across the hall in her office. Tr. 139:24-25, 195:4-12. Instead of an “intern” “Nathan,” in reality, Safety Technician Dathen Walker was at the September 6 meeting. Tr. 139:8. Dahl specifically remembers having Walker with her at the meeting because he was there “to present some photos that he had taken inside the mill” showing good visibility. Tr. 139:8-11.

Third, beyond vague recollection of who attended the September 6 meeting, Miller also denied making several inflammatory and offensive remarks, which is completely contradicted by several other witnesses’ testimony. Miller explicitly denied calling management “dumb,” “stupid,”

“idiots,” that no one ever listened to his ideas, and that he could make more money working somewhere else. Tr. 87:4-21. However, Dahl specifically remembers that Miller said that he did not think Dahl or Chad Lynch were stupid, but “the rest of the management team is a bunch of idiots.” Tr. 141:11-14. Dahl explained that Miller became increasingly frustrated and loud saying that “managers are stupid, no one listens to me” and that he would be better off and make more money elsewhere. Tr. 143:7-11. Thayer, who is no longer even employed with RFP, confirmed that Miller repeatedly used the words “dumb,” “stupid,” and “idiots.” Tr. 196:2-5. Furthermore, Ken Miller, Nick Miller’s own Uncle, testified that Nick Miller called management “dumb” and “stupid” during the September 6 meeting. Tr. 270:8-12. All of these witnesses, including a witness who no longer works for RFP, testified that Miller repeatedly called management several demeaning names in an increasingly agitated manner, all of which directly contradicts Miller’s own version of what happened at the September 6 meeting.

Most importantly in Miller’s credibility determination is the fact that he was completely inconsistent between his testimony on direct and cross examination. On direct, he stated that Thayer “called and told me that the management team had made a decision and that because of, you know, what I had posted and I—kinda—he kinda beat around the bush a little bit.” Tr. 78:11-13. However, when crossed, Miller explicitly admitted that Thayer never said Miller was fired because of his Facebook post. Tr. 88:11-13. Later, when asked why he thought he was fired, Miller’s response was: “I assumed it was over the Facebook post.” Tr. 91:22-25. Miller admitted that his earlier testimony was inaccurate and on redirect shows that Miller was replacing his own subjective opinions of the reasons for his termination with any actual reasons that the company gave him. This line of questioning alone is sufficient to completely discredit all of Miller’s

testimony. When viewed in light of the other inconsistencies between Miller's testimony and that of several other witnesses, it is clear that Miller should not be credited.

2. Testimony Inconsistent with Established Facts

Miller's testimony must also be discredited when viewed in light of the established facts on the record. The parties do not dispute that Miller posted on the Union Facebook group about the smoke in the plant and said: "This is the level of stupidity that our management team has elevated to." Emp. Ex. 4; GC Ex. 4. Therefore, it is an established fact on the record that Miller had already called management stupid. Miller also testified telling his uncle Ken Miller on September 5 that it was a "dumb idea" for management to close the doors during the day. Tr. 84:14-16. For Miller to then testify, against several other witnesses' direct contradiction, that he never called anyone "stupid," "dumb," or "idiots" at the September 6 meeting despite Weakley confirming that Miller raised his voice during the meeting, is difficult to believe. Tr. 36:16-18, 87:4-21. It is an established fact that Miller had already called management "stupid" and "dumb" prior to the September 6 meeting. Miller's rote denials of calling management those same derogatory names at the September 6 meeting is implausible and discredits Miller's testimony even further.

3. Inherent Probabilities

Inherent probabilities contrary to the witness's testimony can also render the witness's testimony not credible. *The Video Tape Company*, 288 NLRB 646, 657 (1988) (ALJ discredited an employee's inherently improbable testimony that he was fired for engaging in union activity where employer had tried to dissuade other employees who were engaged in the same union activity from quitting). Miller had a history of behavioral issues and a generally poor attitude about

working at RFP. Ramm testified that Miller had been disciplined a couple times in the last year and RFP saw a “repeated pattern” of behavior where Miller had difficulty following instructions and treating people respectfully. Tr. 234:8-13. Thayer also testified about corrective action that Miller received and how RFP had given Miller a copy of a book that teaches people how to communicate productively in an attempt to help improve Miller’s communication and behavioral issues. Tr. 187:1-188:2. In his 2016 performance review, Miller called his then-first level supervisor a “compulsive liar.” Emp. Ex. 15

Despite Miller’s rote denials, it is inherently probable that Miller’s conduct at the September 6 meeting was similar to that which he had already been warned about and been given the tools to correct because he had already established a pattern of similar behavior in working at RFP. Miller’s testimony that he did not behave in an egregious manner nor did he make any derogatory comments at the September 6 meeting should be discredited because it is simply improbable when viewed in light of his performance history at RFP.

#### 4. Interest in the Outcome

Where a witness has an obvious interest in the outcome of the case, the ALJ may find a witness’s testimony insufficient to warrant acceptance, especially if the testimony is also inconsistent or embellishes significantly. *Dennett Road Manor Nursing Home, Inc.*, 295 NLRB 397, 401 (1989). In *Dennett Road*, the Board upheld the ALJ’s credibility determination of a witness who was the wife of a terminated employee and had a clear interest in the outcome of her husband’s case. *Id.* There, the ALJ explained that “my suspicion as to her credulity runs sufficiently deep to warrant rejection of all her testimony except to the extent confirmed by [the supervisor].” *Id.* at 402. Here, Miller has a clear interest in the outcome of this case. Further, his

testimony was both internally inconsistent between direct and cross examination, and completely inconsistent with that of other compelling witnesses' testimony. Considering Miller's obvious interest in the outcome of the case in addition to the significant inconsistencies in his testimony, just like in *Dennett Road*, his credibility and testimony should be rejected.

5. Consequence of Having Witness Testimony Discredited

Under Board law, it is appropriate to completely reject a witness's testimony from the record when the testimony lacks credibility and to only accept those portions of the witness's testimony that are corroborated by the testimony of credible witnesses or established facts. *Id.* at 402; *Millwright & Machinery Erectors*, 152 NLRB, 1389 (1965), *enf'd*, 379 F.2d (5th Cir. 1967) (ALJ denied to accept complainant's testimony where the witness attempted to assume the role of the victim and appeared to be testifying with the sole objective of sustaining his charge of unlawful discrimination). Miller's testimony is not credible because it was replete with lack of memory, vague comments, denials of well-established facts, and conclusory statements that provide no real evidence. Specifically Miller's testimony fails each of the credibility factors the Board instructs an ALJ to analyze: (1) there is substantial conflicting testimony between Miller's direct and cross examination and when comparing Miller's testimony with that of other credible witnesses; (2) Miller's testimony is inconsistent with established facts in the record; (3) it was inherently probable that Miller's conduct at the September 6 meeting was of the same nature as the bad behavior he had been warned of before; and (4) Miller has an obvious outcome in the proceeding.

Based on the lack of credible testimony from Miller, his testimony should be rejected in as much as it is not supported by evidence beyond his testimony, and it should not be considered for any factual findings.



**B. Miller's Post Was Not a Motivating Factor of His Suspension or Termination**

The NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in § 7” and to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. §§ 158(a)(1) and (3).

Based on the theory in the Complaint, and Counsel for General Counsel's opening statement, the applicable test set is *NLRB v. Wright Line, Inc.* Under this standard, the General Counsel must “make a prima facie showing sufficient to support the inference that [the employer's opposition to] protected conduct was a ‘motivating factor’ in the employer's decision.” 251 NLRB at 1089. If Counsel for the General Counsel makes this showing, the burden then shifts to the employer to establish that it would have taken the same action even in the absence of the protected conduct. *Id.* This standard requires the Counsel for the General Counsel to establish the discipline was motivated by or because of that activity. *See, e.g., Nordstrom dba Seattle Seahawks*, 292 NLRB 899 (1989); *Clark & Wilkens Indus.*, 290 NLRB 106 (1988), *enf'd* 887 F.2d 208 (D.C. Cir. 1989); *Hambre Hombre Enters. v. N.L.R.B.*, 581 F.2d 204 (9th Cir. 1978). In proving such an unlawful motive, Counsel for the General Counsel must also prove that RFP possessed union animus. *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009 (3d Cir. 1980), *cert. den.*, 449 U.S. 1078 (1981).

In this case, Counsel for the General Counsel failed to establish a prima facie case under *Wright Line* that Miller was suspended or disciplined because of any post.

1. Miller's Termination Was Not Motivated By or Because of Any Post

- a. Ramm had no knowledge of the Facebook post.

Counsel for the General Counsel must prove knowledge on the part of the employer that the employee engaged in union activity, and that the discipline was imposed because of this activity. *NLRB v. Gateway Theatre Corp.*, 818 F.2d 971 (D.C. Cir. 1987).

It is undisputed that Ramm, alone, possessed authority to terminate Miller's employment. It is also undisputed that Ramm did not even know about the Facebook post at the time of Miller's termination. In fact, Ramm had never seen the post until the hearing on this matter. Tr. 246:18-247:8. If Ramm was not aware of the post, the post was certainly not a motivating factor for Ramm's decision to terminate Miller's employment.

Further, while Thayer and Dahl told Ramm that Miller had some concerns about how RFP had handled the smoke in the mill, the conversation that they had on September 6 "wasn't a disciplinary discussion at all. It was really a discussion to troubleshoot." Tr. 247:12-19. Specifically, the company wanted to have a discussion on what it could have done better, but the conversation completely changed into a rant about how management is "dumb" and "stupid" and how Miller believed that he would be better off somewhere else. Tr. 142:3. In fact, within about 10 minutes, the conversation moved so far away from anything to do with smoke, Miller's comments about smoke, or ideas of how RFP might implement to combat the smoke, that Dahl left the meeting. Tr. 145:1. There is simply no evidence that Miller's Facebook post or any other alleged concerted activity played a role in Ramm's decision to terminate Miller.

The record lacks evidence that Miller was suspended or terminated because of his Facebook post. Ramm conducted an independent review of Miller's personnel file, and considered Miller's history when deliberating on termination. There is no evidence Ramm knew of the post, let alone that he was motivated by any post in his decision to terminate Miller's employment. In

fact, even Miller admitted there is no evidence that his termination was because of his post. Miller testified that he just “assumed” his termination was because of his post. Tr. 91:23-25.

b. Comparable Facebook posts did not result in discipline.

Over the past couple of years, there have been several instances where employees aired concerns on Facebook and RFP took steps to address those employees’ concerns. RFP has never terminated an employee for a Facebook post, and RFP has never asked an employee to remove a comment posted on Facebook. RFP maintains Social Media Guidelines which explicitly state: “[t]hese guidelines are not intended to interfere with your legally protected rights or to prohibit communications protected by law.” Emp. Ex. 6. The Vice President of Human Resources, Kellye Wise, also came to the Riddle mill to train on the Guidelines when they were issued in 2017 that the company can “encourage people to share feedback” but that it is “protected for them to share whatever they feel and would like to share on social media.” Tr. 117:7-10. Dahl also explained that pursuant to the company’s Open Door Policy, RFP’s practice is to follow up with the individuals who have raised concerns on Facebook and encourage them to bring their concerns to the company so that the company can address employees’ concerns. Tr. 118:11-119:12; Emp. Ex. 7. Every one of these conversations that RFP has had with employees have been respectful and ended on a positive note, except the conversation it had with Nick Miller on September 6. Tr. 175:13-19.

**Scott McCool:** For example, Dahl testified about when employee Scott McCool made a negative Facebook post about RFP when the company implemented a personal safety requirement that employees wear hard hats and protective coverings over their glasses. Tr. 112:24-113:23; Emp. Ex. 5. McCool had shared concerns with Dahl that he disagreed with the requirement that

employees wear hardhats. Tr. 164:10. Ramm had a conversation with McCool about his concerns regarding the hardhats, but McCool was never asked to take down the post nor was he disciplined for making the negative post about RFP. Tr. 114:22-24, 164:24.

**Jay Milburn:** Dahl also testified about a conversation she had with Jay Milburn because of his Facebook post. Milburn posted about using sick time for his birthday and complaining that he was scheduled to work. Tr. 120:5-19; Emp. Ex. 8. Dahl saw Milburn's post because they were already Facebook friends from working together with a previous employer. Tr. 120:7-13. Because RFP was having a hard time with some employees abusing their sick time and using it for vacation, when Dahl saw Milburn at the plant that day, she told him that she really appreciated his coming to work and not using sick time to cover a birthday. Tr. 122:12-17. Dahl's entire interaction with Milburn about his post was positive and did not result in any form of discipline for Milburn. Tr. 124:11-17.

**Becky Smith:** Another employee, Becky Smith, has posted several complaints about RFP on Facebook, none of which has resulted in discipline to Smith for making the posts. In March of 2017, Smith posted that her supervisors were treating her unfairly and that a supervisor had asked her to do something she felt was unsafe. Tr. 124:24-25, 126:5-7. Smith had already talked to Dahl about the incident with Smith's supervisor and RFP had suspended the supervisor pending an investigation. Tr. 126:10-13. Dahl was concerned that Smith felt RFP was not addressing her concerns, when Dahl had already had a conversation with Smith explaining that they took the situation very seriously and had suspended the supervisor pending investigation. Tr. 126:15-16. Dahl assured Smith that the company was going to take whatever action was appropriate based on the results of its investigation and Dahl had "stayed up all night and interviewed every single

employee that worked with that supervisor and asked every single employee, had he ever asked them to do anything unsafe.” Tr. 126:17-19. In talking with Smith about her post, Dahl wanted to be able to discuss if Smith really felt that her concerns were not being addressed. Tr. 127:20-128:3. Smith was never disciplined in any way for the Facebook post. Tr. 128:4-5.

On September 3, 2017, Smith posted a picture of the inside of the mill. Tr. 128:8-18; Emp. Ex. 9. Smith also posted a photo that she took while parked across the street looking at the mill. Tr. 133:1-2. At the time, HR Manager Thayer and Plant Superintendent Muir talked with Smith about her pictures, not the fact that Smith made any Facebook posts. Tr. 131:23-25. RFP wanted to address two issues with Smith: 1) taking photos inside of the mill without permission is against RFP policy, and 2) the fact that Becky was clearly offsite if she had been able to take a picture from across the road, and yet she had not clocked out. Tr. 128:18-19; 133:4-5. Taking photos of the inside of the mill without permission risks exposure of RFP’s proprietary information and is a violation of RFP policy. Additionally, an employee who fails to clock out when going offsite creates a safety issue for RFP because in the event of an emergency, the company would search for Smith believing that she was still in the mill. Tr. 133:5-8. RFP takes these safety policies very seriously and Smith was disciplined for failing to clock out when going offsite. Tr. 133:8-9. However, this discipline never had anything to do with the fact that Smith had made any Facebook post. Tr. 133:13. Again, RFP never asked Smith to retract any comments made on social media.

**R.C. Jenkins:** On September 4, 2017, employee R.C. Jenkins posted a photograph of the inside of the mill. Emp. Ex. 10. RFP spoke with Jenkins after the photo that was posted, and RFP reminded Jenkins of the company policy’s on photos of the inside of the mill. RFP takes the

protection of its proprietary information seriously. Tr. 133:24-134:4. Jenkins removed the photo. 133:25, 134:4. Notably, Jenkins was never disciplined for his post. Tr. 134:22-23.

All of these examples show that employees are never disciplined because they posted a negative comment about RFP. Rather, when the company learns of these posts, it sees them as an opportunity to discuss any concerns employees may be having and ways that RFP can improve. RFP's multiple examples of comparable union employee conduct who were not disciplined shows Counsel for General Counsel cannot establish evidence Miller's suspension or termination were motivated by his post.

Here, RFP treated Miller, who posted on Facebook, differently than other employees who posted on Facebook, which tends to disprove an allegation that Miller's discharge was motivated by his protected activity. *See Livin' Spoonful, Inc.* 361 NLRB No. 52 (2014).

## 2. RFP Did Not Possess the Requisite Union Animus

Counsel for General Counsel cannot show any evidence of union animus here. Rather, the evidence shows that RFP has good relations with the union employees, and always tries to engage employees to resolve any issues or concerns. "An anti-union attitude cannot lightly be inferred onto an employer with a history of good union relations, and mere suspicions of unlawful motivation are insufficient to establish violations of the NLRA." *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1408 (5th Cir. 1996).

In this case, Miller engaged in the same activities as McCool, Milburn, Smith, and Jenkins. The lack of discipline for McCool, Milburn, Smith, and Jenkins shows a lack of animus because multiple employees engaged in the same protected activity, and only Miller experienced negative consequences.

### 3. RFP Would Have Terminated Miller Regardless of Any Concerted Activity

The evidence shows that Miller would have been terminated regardless of any concerted activity. Employers “may and should apply their usual rules and disciplinary standards to a union activist just as they would to any other employee.” *Wright Line*, 662 F.2d at 901. The General Counsel relies on Miller’s comments about smoke in the mill on September 5 and 6 to say that all of Miller’s conduct on September 6 was protected. However, “[t]iming alone is not sufficient evidence upon which to sustain an unfair labor charge.” *Harper & Arterburn Co., Inc. v. NLRB*, 692 F.2d 402, 402 (6th Cir. 1982). In *Harper*, the Sixth Circuit held that an employee who was fired shortly after he requested that a union steward be placed on a company jobsite should not be reinstated. *Id.* The court noted that the evidence showed the employee to be a “difficult worker whose complaints and demands disrupted other employees and the progress of construction generally.” *Id.* Ultimately, the court found that “the fact that [the employee] was dismissed shortly after complaining about the absence of a union steward cannot by itself erase the just cause which otherwise existed for his firing.” *Id.*

Similarly, in *J.P. Stevens & Co. Inc.*, an employee who had previously engaged in protected work stoppages was subsequently discharged for poor work performance. Case 11-CA-9370, 1981 NLRB GCM Lexis 61 (Advice Memorandum, Feb. 18, 1981). Prior to his discharge, the employee had received two written warnings and oral warnings for poor work performance and the employer had offered to move him to different positions, which the employee had refused. *Id.* at \*2-3. Concluding that the charge should be dismissed, absent withdrawal, the Division of Advice stated:

[A]lthough [the employee] has engaged in union activity as well as protected concerted activity, the record is devoid of any indication that such activities were ‘a motivating factor’ in [the employee’s] discharge. *Wright Line*, 251 NLRB No. 150 (1980). Moreover, it is

uncontradicted that the employer issued repeated warnings to [the employee] regarding his poor work performance . . . . Accordingly, it is plain that [the employee] was discharged for legitimate business reasons, rather than for engaging in union or protected concerted activity.

*Id.* at \*3.

The record is replete with evidence that Miller's employment was terminated because "he was damaging the rest of the team" and he simply refused to line "up with the principles and values" of RFP. Tr. 235:20-22. No one denies that Miller was a skilled detail saw operator. In fact, Ramm testified that "he was a great operator. I think he was super intelligent." Tr. 235:17-18. However, after reviewing performance reviews, the series of behavior issues, a prior warning about his behavior, Ramm decided to terminate Miller's employment because of the "repeated pattern of behavior that we saw where Nick had difficulties in following instructions and treating people respectfully." Tr. 234:8-13. Despite a year and a half of having conversations and even warnings to Miller that his performance and attitude needed to change, the September 6 meeting only represented an increase in Miller's level of disrespect, unprofessionalism, and unwillingness to improve based on the culture change that Ramm was working hard to effect at the mill.

In this case, General Counsel cannot show that any concerted activity was a motivating factor for Miller's termination or that RFP had any union animus. The evidence shows a number of employees posted very negative comments about RFP, but they were not disciplined for the comments or asked to remove any comments. The evidence establishes that Miller's employment history showed his unprofessional and disrespectful conduct was escalating, his engagement was decreasing, and RFP saw no sign of improvement. RFP's decision to terminate Miller's employment was legitimate and based on multiple factors having nothing to do with any concerted



activity. Accordingly, this Court should find that RFP did not violate sections (a)(1) or (a)(3) when it terminated Miller's employment.

**C. In the Alternative, Miller Was Terminated for His Behavior During a Rant About His Personal Gripes**

Even if Miller was engaged in concerted activity during the first 10 minutes of the September 6 meeting, he was no longer protected by the Act when his rant turned the meeting into "mere griping." The Board has long held that, for conversations between employees to be protected concerted activity, they must look toward group action because mere "griping" is not protected. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). Moreover, the Board held in *Lutheran Social Service of Minnesota*, behavior that is "essentially aimless and undirected, consisting of unremitting complaining about the value of management policies and the competence and good faith of their managers" may be a form of concerted activity, but it is not one that is protected by the Act. 250 NLRB 35, 44 (1980).

In *Lutheran Social Service*, two highly skilled employees disagreed with management's decision to implement program changes. *Id.* at 36. Their disagreement resulted in repeated complaints about the changes, but also about the program administrator personally and his "incompetence" in his role. *Id.* at 37. The administrator specifically warned the two employees that their "continued negativism about the changes could result in termination." *Id.* at 36. After a few months of continued complaints and negative attitudes, and without any sign of improvement, the employees were terminated. *Id.* The Board upheld the ALJ's decision who explained that while the employees' conduct "was loosely concerted, it is hard to say that it was directed toward any particular objective . . . they filed no grievances; and they made no demands. What they did, essentially was to complain, criticize and carp from, as it were, the sidelines." *Id.* at 41.

The ALJ noted that the Act “protects protests in which there inheres action or the possibility of action. It has been applied even in cases where the dissatisfaction is embryonic and only hints at future group behavior.” *Id.* at 33-34. Nevertheless, citing *Mushroom Transp.*, the ALJ explained that the employees’ “conduct, though jointly engaged in by two or more individuals, really amounts to no more than ‘mere griping,’ which the Act does not seek to protect.” *Id.* The ALJ went even further to say that even had the employees’ conduct been protected activity, their behavior rendered them “unfit for further service” because it had reached a point, “particularly in view of the directionless nature of the carping” that “too much was enough.” *Id.* at 44.

Cases as recent as 2017 continue to utilize the ALJ’s decision in *Lutheran Social Service of Minnesota. Mat-Su Regional Med. Ctr.*, No. 19-CA-180385, 2017 NLRB Lexis 356 (2017) (finding that an employee’s complaint to her supervisor was not protected by the Act); *Ekhaya Youth Project, Inc.*, No. 15-CA-155131, 2016 NLRB Lexis 525, \*28 (2016) (finding that the termination of two employees did not violate the Act because the employees’ text messages and discussions “had no other purpose than to demean” their superiors); *PHC-Elko*, 347 NLRB 1425 (2006) (upholding the termination of an employee who said she would rather resign than say anything positive about the employer during a meeting the employer held to encourage employees vote against union representation.). Further, the Board has long held that general complaints about the competence of upper level managers are normally unprotected because they do not relate to wages, hours, and other terms and conditions of employment, *Retail Clerks Union, Local 770, Retail Clerks Int’l Ass’n*, 208 NLRB 356 (1974).

Miller’s situation is just like that of the employees who were terminated in *Lutheran Social Service*. As early as May of 2016, Miller had called his supervisor to his face a “liar,” “worthless,”

and accused him of being lazy. Tr. 148:16-18. When talking to Miller about losing his certified buddy status around the same time, Miller was warned that his attitude and behavior needed to improve for him to continue working at RFP. Emp. Ex. 11. Despite the warning, Miller's bad attitude continued, even writing on his December 2016 performance review that his supervisor was a "compulsive liar" and "over all a very bad supervisor." Emp. Ex. 15. In spring of 2017, Ramm had to have a meeting with Miller again to warn him about his attitude and behavior because Miller had made rude and offensive comments about management's decisions to fire his father (who was a supervisor at RFP) rather than the supervisor Miller did not like, in front of a large crowd. Tr. 242:12-14.

Nevertheless, Miller persisted in being negative and complaining about decisions that management was making. During the September 5, 2017 crew meeting in the lunchroom, Dahl specifically asked Miller if he had any ideas on how RFP could be doing better. Tr. 108:15-109:3. All Miller had to offer, was that management was "stupid" to think that it was going to be able to keep smoke out of the mill. Tr. 109:1-3. At the September 6 meeting, after again asking Miller how they could help address his concerns about the smoke and if he had any ideas on how to improve, Miller took the conversation in a totally different direction and "launched into something totally separate." Tr. 142:3. Miller went on and on about how no one at RFP ever listens to his ideas, how he's had a lot of ideas that are never implemented, how the company would make a lot more money if it would implement his suggestions, and how Miller would be better off and make more money if he worked somewhere else. Tr. 142:7-14. At that point in the conversation, Miller was raising his voice and "it really turned into, managers are stupid, no one listens to me." Tr. 143:9-10. Multiple people in the room repeatedly asked Miller to calm down and to keep it

professional, but each time Miller “just got louder and seemingly more frustrated.” Tr. 144:9-12. When the conversation reached a point where it was “out of control,” Thayer suspended Miller pending an investigation into Miller’s conduct. Tr. 195:21.

Just like the denials of one of the employees in *Lutheran*, Miller denies making the negative and offensive statements. 250 NLRB at 38 n. 11. Just like the employees in *Lutheran*, Miller offered no suggestions for improvement—he had no intention to “inhere action or the possibility of action” rather, his intention was to “complain, criticize, and carp.” *Id.* at 41. Just like in *Lutheran*, the employee’s use of language was “very inconsistent with the overall policy, the overall philosophy” of the company. *Id.* at 38. Miller was also “expressly warned” that his continued poor behavior could result in termination. *Id.* at 43. Just like in *Lutheran*, Miller had “unquestioned capabilities” as a Detail Saw Operator and prior to management’s implementation of a culture change, a history of good performance reviews. *Id.* at 36. Like the ALJ held in *Lutheran*, Miller’s diatribe “had transcended the issues” at the workplace and “had been transmuted into contemptuous and vulgar characterization of the managers, their capacities, and their motives.” *Id.* at 45. As the ALJ described in *Lutheran*, Miller’s conduct had reached a point where “it was properly thought that too much was enough.” *Id.* at 43. Just like in *Lutheran*, Miller’s termination should be upheld because his conduct amounted to “aimless and undirected” complaining about management’s competence, which is not the type of behavior protected under the Act.

**D. In the Alternative, Under the Totality of the Circumstances, Miller’s Conduct Was Sufficiently Egregious to Lose the Protection of the Act.**

As established above, the appropriate standards to apply in this case are *Wright Line* and *Mushroom Trans. Co.*. During the September 6 meeting, if there was concerted protected activity,

it was limited to the first 10 minutes, and Miller's personal gripes continued for the next 20 to 35 minutes. It was during this rant that Miller's called RFP management idiots, stupid and dumb. However, even under *Atlantic Steel*, an employee may lose the protection of the Act due to opprobrious conduct. The Board carefully balances the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979). The Supreme Court has held that even if conduct is concerted, it "does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984).

Further, an employer "does not have to tolerate abuse and insubordination of a supervisor by an employee." *J.L.M. Inc. & Local 217*, 1991 NLRB Lexis 389, 133 and 193 (1991) (upholding termination where employee used colored language and previous anger problems were noted in the employee's performance review), *modified on other grounds by* 312 NLRB 304 (1993). The Board continues to recognize that "there is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Care Initiatives*, 321 NLRB 144, 151 (1996).

In *Pier Sixty*, the Board explained that in order to apply the factors of *Atlantic Steel* properly, it must look to the specific facts surrounding the workplace standard of conduct. 362 NLRB No 59 (2014). The standard of acceptable conduct varies among workplaces, and therefore each case must be closely analyzed on the facts. If level of acceptable comments in workplace slide the standard of protected conduct under *Atlantic Steel* in *Pier Sixty*, the level of acceptable

comments at RFP's Riddle Plywood mill must also slide the standard – in the opposition direction – under *Atlantic Steel*.

Without contradiction, the record in the case reflects there is a very low tolerance for unprofessional behavior at RFP's Riddle Plywood mill, and calling another an “idiot,” “dumb” or “stupid” is way beyond the limits of acceptable conduct. Compared to the tolerable behavior at RFP, Miller's conduct was a complete affront to professional conduct required by RFP.

1. The Culture of a Workplace Sets the Bar of Acceptable Conduct

The level of acceptable conduct of the workplace sets the bar for unprotected conduct. In *Pier Sixty*, the Board addresses whether an employee's conduct was so egregious as to lose the protections of the Act. The Board gave great importance to the standard of regular discourse at the particular workplace. In *Pier Sixty*, the workplace regularly included profanities, vulgar insults, and shouting both from management and employees. Specifically, after an employee had argued with his supervisor, the employee posted on his Facebook: “Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!” *Id.* at \*5. The Board found that the employee's vulgar language was protected because: “vulgar language is rife in the . . . workplace, among managers and employees alike. *Id.* at \*6. For example, the executive chef “cursed at employees daily, screaming profanities such as ‘motherfucker’ and asking employees questions like ‘Are you guys fucking stupid?’” *Id.* Another supervisor would scream epithets at dishwashing employees like “asshole” and “What are you fucking guys slow?” *Id.* at \*7. These are just a few examples the Board used to show that screaming, vulgar insults, and profanities were “a *daily*

occurrence in [the] workplace, and did not engender *any* disciplinary response” from the employer. *Id.* (emphasis added).

Three key factors that the Board reviewed to determine whether the employee’s post was protected included: “whether the [employer] considered language similar to that used by [employee] to be offensive; whether the employer maintained a specific rule prohibiting the language at issue; and whether the discipline imposed upon [employee] was typical of that imposed for similar violations or disproportionate to his offense. *Id.* at \*9. The Board specifically noted: “the overwhelming evidence establishes that, while distasteful, the [employer] tolerated the widespread use of profanity in the workplace, including the words ‘fuck’ and ‘motherfucker.’” *Id.* at \*13. Therefore, the employee’s use of that same vulgarity would not cause the employee to lose the protection of the Act because it was not “qualitatively different from profanity regularly tolerated” by the employer. *Id.* Looking to those same three factors, Miller’s conduct lost the protection of the Act because: (1) RFP considers Miller’s language offensive; (2) RFP maintains specific rules prohibiting that type of language; and (3) other employees have been disciplined for language far less severe than Miller’s.

## 2. RFP Considers Nick Miller’s Language Offensive

RFP’s culture simply does not permit employees to call each other dumb, stupid, idiots, or anything of the like and RFP expects employees to be able to speak with one another with respect. Tr. 228:2-14. Former Plant Manager Ramm specifically testified that in 2014, when he was first hired, his core focus was on enhancing employees’ self-esteem and getting rid of certain behaviors at the plant like yelling, screaming, and any forcible communications. Tr. 226:1-5. Ramm explained that when he started in 2014, “the use of some very specific four letter words were quite

prominent” but that he was requiring employees to change their behavior and to use more professional language. Tr. 230:2-8. However, Ramm implemented a specific strategy in order to effect the culture change “in how we treated each other.” Tr. 226:1. As part of the culture change, Ramm and Dahl attended crew meetings at the end of 2016 and beginning of 2016 to talk to employees on how to treat one another and explaining that the operating principles require employees to communicate with respect. Tr. 227:14-20, 228:19-21. Ramm specifically reminded employees in these meetings that RFP defines “respectful as not using foul language or derogatory comments.” Tr. 227:21-22. The evidence shows that Miller’s inability to calm down and “keep it professional,” despite multiple requests that he do so, in addition to his repeated and agitated name-calling of management as “dumb,” “stupid,” and “idiots,” is highly offensive conduct at RFP.

### 3. RFP Policies Prohibit Miller’s Language

RFP’s policies also demonstrate that Miller’s language was unacceptable because respect, open communication, and professionalism are key at RFP. First, RFP’s core values are paramount in demonstrating its commitment to maintaining respect and professionalism:

Sawdust in the Veins.

Handshake Integrity.

Driven to Win.

Emp. Ex. 3. RFP’s Non-Harassment Policy also explains that it will “not tolerate behavior that is inappropriate” and that “[e]ach and every employee is expected to conduct themselves in an appropriate, professional manner.” Emp. Ex. 3; Tr. 103:2-8. This expectation is foremost and is communicated early on as the company’s core values in hiring and as part of orientation for all employees of RFP. Tr. 104:2-5. RFP’s Open Door Policy also explains that “it is important that you have a way to address work-related issues. We strongly believe that by working together, we



can resolve almost any question or concern that may arise. If you have a problem or concern, we want you to tell us.” Emp. Ex. 7. Miller even testified he “knew that Roseburg had a nonharassment policy” and that Ramm told Miller about the Open Door Policy if he ever wanted to talk with Ramm. Tr. 252:23-253:15. The evidence shows that Miller was aware that RFP maintained policies that prohibited his disrespectful rant at management; however, knowledge by Miller of the policy is not an element that RFP must prove under the circumstances.

4. Other Employees Have Been Disciplined For Similar Violations

RFP has even disciplined tenured supervisors if they do not speak to employees with respect and professionalism. For example, Ramm disciplined Nick Parker, a 20-year RFP supervisor for his inappropriate comment to an employee. There, one of Parker’s crew had raised a safety concern that he was hitting his head on a bolt that was hanging from up above on a beltway. Tr. 226:24-227:2. In response, Parker merely responded “well, duck next time.” Tr. 227:3. After learning of the supervisor’s comment, Ramm investigated and suspended Parker for two weeks. Ramm knew that some considered the suspension overly harsh, but Ramm “was making sure that everybody understood that’s not how we treat people.” Tr. 227: 5-8. The Parker example is just one instance where RFP has disciplined employees for not maintaining the respectful and professional environment that it expects of management and employees alike.

The record shows that unlike in *Pier Sixty* where daily shouting, vulgarities, profanities, and offensive comments resulted in no disciplinary action, such behavior is entirely unacceptable at RFP. RFP’s workplace standard simply would not allow Miller’s offensive and demeaning comments in any context, in addition to the fact that he could not calm down and keep it professional despite being asked to do so multiple times. Therefore, even if Miller was engaged in

concerted activity, his egregious behavior at the September 6 meeting lost the protection of the Act and he was lawfully suspended.

## **V. CONCLUSION**

In conclusion, the complaint should be dismissed because: (1) Miller's termination was lawful under *Wright Line*; (2) Miller's termination was also lawful under *Atlantic Steel* and *Pier Sixty*; and (3) Miller's termination was still lawful under *Mushroom Transportation*. The General Counsel has failed to establish that RFP engaged in any unfair labor practices. Therefore, the complaint against RFP should be dismissed in its entirety.

DATED this 3rd day of October, 2018.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **POSTHEARING BRIEF OF RESPONDENT ROSEBURG FOREST PRODUCTS** and served it via e-mail on:

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CERTIFICATE OF SERVICE